

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RONELL X. WILLIAMS,

Plaintiff,

vs.

HOWARD SKOLNICK, et. al.,

Defendants.

3:07-CV-00391-ECR (RAM)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., Senior United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4.

Before the court is Defendants' Motion to Dismiss (Doc. #7). Plaintiff opposed the motion (Doc. #12) and Defendants did not reply.

Both parties submitted matters outside the pleadings, including exhibits and affidavits, in support of and in opposition to the instant motion; thus, both parties have had a reasonable opportunity to present all material relevant to a motion for summary judgment. This Report and Recommendation considers all matters submitted by both parties; therefore, the instant motion is treated as a motion for summary judgment in accordance with FED. R. CIV. PRO. 56.

I. BACKGROUND

Plaintiff is a prisoner in Ely State Prison (ESP) in Ely, Nevada in the custody of the Nevada Department of Corrections (NDOC) (Doc. #4). At the time of the facts giving rise to his complaint, Plaintiff was a prisoner in High Desert State Prison (HDSP), in Indian Springs, Nevada also in the custody of NDOC (*Id.*). Plaintiff brings his complaint pursuant to 42 U.S.C.

1 § 1983, alleging state officials violated his First Amendment right to the free exercise of
2 religion and his Fourteenth Amendment right to equal protection (Doc. #4). Plaintiff names
3 the following Defendants in their individual and official capacities: Glen Whorton, Dwight
4 Neven, Isidro Baca, James G. Cox, and Chaplain Dave Casaleggio (*Id.*).

5 In Count I Plaintiff asserts violations of his First Amendment right to the free exercise
6 of his religion and his Fourteenth Amendment right to equal protection (Doc #4 at 4-5).
7 Plaintiff alleges Defendants Neven, Baca, Wallace and Casaleggio denied his special religious
8 diet request pertaining to fasting during the month of December, which Plaintiff asserts the
9 Nation of Islam (NOI) observes as the Ramadan (*Id.*). Plaintiff further alleges he filed
10 grievances regarding the denial of a special religious diet and Defendants Neven and Cox
11 denied his First and Second Level grievances (*Id.* at 5). Plaintiff then alleges he submitted
12 a request to Defendant Whorton requesting the December Ramadan fast be honored, which
13 Defendant Whorton denied (*Id.*). Next, Plaintiff alleges he submitted a Religious Faith Group
14 Recognized Application to Defendant Casaleggio, which apparently was also denied (*Id.* at
15 7). Plaintiff asserts he is unable to exercise his religious beliefs as long as those beliefs are
16 ascribed to the NOI (*Id.*). Plaintiff further asserts Defendants have a racial animus towards
17 NOI members because they believe NOI members hate “white folks” and NOI members are
18 predominately Black (*Id.*). Plaintiff alleges Defendants subjected him to unequal treatment
19 in the form of requiring him to file a request to have his faith group recognized, labeling him
20 as part of a security threat group (STG), and falsely considering him part of a gang because
21 he is a member of the NOI (*Id.* at 8). Plaintiff contends that, despite Prison Reform Minister
22 Derrick Muhammad’s signed memo addressed to Defendant Neven and the office of
23 Defendants Baca, Wallace and Morrow which purportedly provides the basis for the December
24 fast and contact information, Defendants have refused to recognize NOI as a religion and, in
25 so doing, have violated his constitutional rights (*Id.*).

26 In Count II, Plaintiff asserts a violation of his First Amendment right to the free exercise
27 of his religion (*Id.* at 10). Plaintiff alleges Defendants have written him up for MJ-10 gang
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1 affiliation violations and transferred him to a maximum security prison because of Plaintiff
2 practicing his religion (Doc. #4 at 10). Plaintiff alleges Defendants do not make allotments
3 for any of his religious garments as they do other religious groups and Defendants show
4 favoritism to other religious sects by enforcing Administrative Regulations (AR) 810 and 814
5 in an arbitrary and capricious manner (*Id.* at 10-13). Plaintiff further alleges Defendants
6 Whorton and Cox allow their subordinates to discriminate against Plaintiff and the NOI
7 because of NOI's "ideology that white people are Satan mentioned in the Bible and Holy
8 Quran." (*Id.* at 13). Plaintiff contends Defendants Whorton and Cox have discriminatory
9 written practices, customs or policies, which allow other faith groups to have "spiritual
10 leaders" without classifying the inmates who practice in those groups as "militant or gang
11 affiliated." (*Id.*).

12 In Count III, Plaintiff asserts a violation of his First Amendment right to the free
13 exercise of religion (*Id.* at 14). Plaintiff contends Defendants were required to provide him
14 with adequate meals before "dawn" and after sunset during the traditional Ramadan period
15 beginning October 5, 2005 through November 4, 2005 (*Id.*). Plaintiff alleges Defendants
16 Neven, Baca, Wallace, Cassaleggio and Whorton did not make the proper arrangements to
17 have Plaintiff served his meals until after dawn or sunrise (*Id.*). Plaintiff asserts the Ramadan
18 fast for the entire month was "qualitatively diminished" spiritually due to Defendants Neven,
19 Baca, Wallace, Whorton, Cox and Cassaleggio disdaining the integrity of the fast (*Id.* at 15).

20 Plaintiff requests the following relief: 1) compensatory damages; 2) punitive damages;
21 3) prospective damages; 4) special damages; 5) general damages; 6) a temporary restraining
22 order; 7) a permanent injunction; and 8) costs, fees and expenses (*Id.* at 35).

23 II. STANDARD FOR SUMMARY JUDGMENT

24 The purpose of summary judgment is to avoid unnecessary trials when there is no
25 dispute as to the facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*,
26 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled to summary judgment where,
27 viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there
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1 are no genuine issues of material fact in dispute and the moving party is entitled to judgment
2 as a matter of law. FED. R. CIV. P. 56(c); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).
3 Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis
4 for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where reasonable
5 minds could differ on the material facts at issue, however, summary judgment is not
6 appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 516
7 U.S. 1171 (1996).

8 The moving party bears the burden of informing the court of the basis for its motion,
9 together with evidence demonstrating the absence of any genuine issue of material fact.
10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,
11 the party opposing the motion may not rest upon mere allegations or denials of the pleadings,
12 but must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty*
13 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an
14 inadmissible form, only evidence which might be admissible at trial may be considered by a
15 trial court in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); *Beyene v.*
16 *Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

17 In evaluating the appropriateness of summary judgment, three steps are necessary:
18 (1) determining whether a fact is material; (2) determining whether there is a genuine issue
19 for the trier of fact, as determined by the documents submitted to the court; and (3)
20 considering that evidence in light of the appropriate standard of proof. *Liberty Lobby*, 477
21 U.S. at 248. As to materiality, only disputes over facts that might affect the outcome of the
22 suit under the governing law will properly preclude the entry of summary judgment; factual
23 disputes which are irrelevant or unnecessary will not be considered. *Id.* Where there is a
24 complete failure of proof concerning an essential element of the nonmoving party's case, all
25 other facts are rendered immaterial, and the moving party is entitled to judgment as a matter
26 of law. *Celotex*, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut,
27 but an integral part of the federal rules as a whole. *Id.*

III. DISCUSSION

Defendants moves for dismissal of Plaintiff's claims asserting Plaintiff lacks standing to allege Ramadan issues and Plaintiff's complaint is moot because the NOI and the Islamic religion now observe the same Ramadan (Doc. #7 at 8-9). Defendants further move for dismissal asserting Plaintiff failed to grieve the denial of his request to recognize NOI as a religion, Defendants are entitled to Eleventh Amendment immunity, Defendants lacked personal participation, and Defendants are entitled to qualified immunity (*Id.* at 9-14).

Plaintiff argues his complaint is not moot because NOI observes fasting during the traditional Ramadan month and the entire month of December and Defendants' contention that NOI changed its Ramadan schedule is untrue (Doc. #12 at 5). Plaintiff also argues he exhausted his administrative remedies with regard to his request to recognize NOI as a religion and Defendants are not entitled to immunity (*Id.* at 6-9).

A. MOOTNESS (STANDING)

"Mootness can be characterized as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness). Mootness, like the related doctrine of standing, restricts judicial power to the decision of cases and controversies, so that our elected government retains the general power to establish social policy." *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999) (internal quotations and citation omitted). A case is moot where no actual or live "case or controversy" exists. *Id.* In other words, "[a] claim is moot when 'the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *People of Village of Gambell v. Babbitt*, 999 F.2d 403, 406 (9th Cir. 1993) (citing *Western Oil & Gas Ass'n v. Sonoma County*, 905 F.2d 1287, 1290 (9th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991)). "The basic question is whether there exists a 'present controversy as to which effective relief can be granted.'" *Id.* (citing *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988)).

1 Here, Defendants basically assert Plaintiff's claims are moot because NOI changed its
2 Ramadan schedule to the traditional Islamic Ramadan period and no longer requires fasting
3 in the month of December (Doc. #7 at 9). To support this assertion, Defendants attach the
4 Affidavit of Defendant Cassaleggio, in which he states he called NOI headquarters in Chicago
5 and was informed NOI no longer requires fasting in the month of December, but rather follows
6 the traditional Muslim Ramadan schedule (Doc. #7, Exh. C). Plaintiff vehemently disputes
7 this assertion and claims NOI follows both the traditional Muslim Ramadan and the December
8 Ramadan (Doc. #12 at 5).

9 Other than the Affidavit of Defendant Cassaleggio, Defendants have provided no
10 evidence indicating NOI no longer requires its members to fast in December. Furthermore,
11 Defendant Cassaleggio's Affidavit does not specify who at "headquarters" gave him such
12 information, nor does it state when said information was obtained. As previously stated,
13 Plaintiff vehemently disputes Defendants' assertion and insists NOI members follow both
14 Ramadan schedules; therefore, there are genuine issues of material fact as to whether NOI
15 members are required to follow the December Ramadan. Furthermore, as will be discussed
16 in detail *infra* under the qualified immunity analysis, there are genuine issues of material fact
17 as to whether Plaintiff holds a sincere religious belief that *he* must fast in December, which
18 precludes summary judgment on grounds of mootness. Accordingly, Defendants' request for
19 summary judgment on grounds of mootness should be **DENIED**.

20 **B. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**

21 The PLRA provides, in pertinent part, that "[n]o action shall be brought with respect
22 to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner
23 confined in any jail, prison, or other correctional facility until such administrative remedies
24 as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA exhaustion requirement is
25 an affirmative defense that must be raised and proved by the defendant. *Wyatt v. Terhune*,
26 315 F.3d 1108, 1112 (9th Cir. 2003). Exhaustion is mandatory; the district court is left with
27 no discretion. *Woodford v. Ngo*, 548 U.S. 81, 85 (2006).

Prisoners must exhaust all “available” remedies. *Id.* Exhaustion cannot be satisfied by filing an untimely or otherwise procedurally infirm grievance, but, rather, the PLRA requires “proper exhaustion.” *Id.* at 93. “Proper exhaustion” is defined as “using all steps the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).” *Id.* at 2385 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original). This district court has interpreted Justice Alito’s majority opinion in *Woodford* as setting forth two tests for “proper exhaustion”: 1) the “merits test”, which is satisfied when a plaintiff’s grievance is fully addressed on the merits by the administrative agency and appealed through all the agency’s levels, and 2) the “compliance test”, which is satisfied when a plaintiff complies with all critical procedural rules and deadlines. *Jones v. Stewart*, 457 F. Supp. 2d 1131, 1134 (D. Nev 2006). “A finding that a plaintiff has met either test is sufficient for a finding of ‘proper exhaustion’. Defendant must show that Plaintiff failed to meet both the merits and compliance tests to succeed in a motion to dismiss for failure to exhaust administrative remedies.” *Id.*¹

Defendants assert Plaintiff failed to grieve the denial of his request to have NOI recognized by NDOC as a religion (Doc. #7 at 9). Plaintiff argues he did exhaust his administrative remedies regarding this issue (Doc. #12 at 6). Specifically, Plaintiff asserts he filed grievances through all levels specifically dealing with the denial of his Religious Faith Group Recognized Application requesting NDOC recognize NOI as a religion (*Id.* at 6-7).

¹ The Ninth Circuit has held that the failure to exhaust administrative remedies under the PLRA should be treated as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), *cert denied by Alameida v. Wyatt*, 540 U.S. 810 (2003). The Ninth Circuit reasoned that “[s]ummary judgment is on the merits,” whereas “dismissal of an action on the ground of failure to exhaust administrative remedies is not on the merits.” *Id.* In deciding a motion to dismiss for failure to exhaust administrative remedies, the court may look beyond the pleadings and decide disputed issues of fact. *Id.* And, if the district court concludes that the prisoner has not exhausted his administrative remedies, the proper remedy is dismissal of the claim without prejudice. *Id.* at 1120. Thus, this Report and Recommendation, while treating Defendants’ motion as a motion for summary judgment, treats Defendants’ argument that Plaintiff failed to exhaust his administrative remedies as a request to dismiss without prejudice.

1 The record shows Plaintiff did, in fact, properly exhaust his administrative remedies
2 with respect to this issue. Plaintiff attaches an Inmate Grievance Report, Issue ID#
3 20062640865, which details the grievances on each level and shows the grievance responder
4 responding at Level II stating : “I agree with the response given at the informal and 1st level.”
5 (Doc. #12 at 12). The responses given on each level deal directly with the faith groups
6 recognized by NDOC and listed in AR 810 and the denial of NOI as one of those faith groups
7 (*Id.*). Accordingly, Defendants’ request to dismiss Plaintiff’s claim dealing with the denial
8 of his Religious Faith Group Recognized Application should be **DENIED**.

9 **C. ELEVENTH AMENDMENT IMMUNITY**

10 The Eleventh Amendment bars suits for money damages in federal court by a citizen
11 against a state or its agencies unless the state has waived such immunity or Congress has
12 abrogated such immunity by statute. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
13 Thus, Defendants correctly assert that to the extent the Plaintiff’s claims against them in their
14 official capacities are for money damages, no claim will lie. However, Plaintiff also requests
15 injunctive relief against Defendants in their official capacities and a federal court’s remedial
16 power, consistent with the Eleventh Amendment, includes prospective injunctive relief. *Quern*
17 *v. Jordan*, 440 U.S. 332, 338 (“a federal court, consistent with the Eleventh Amendment, may
18 enjoin state officials to conform their future conduct to the requirements of federal law...”).

19 Although Defendants assert Plaintiff’s request for injunctive relief is moot because NOI
20 now follows the traditional Muslim holidays, as previously stated, there are genuine issues
21 of material fact as to whether NOI requires its members to follow the December Ramadan,
22 as well as genuine issues of material fact as to whether Plaintiff sincerely believes he must
23 follow the December Ramadan. Accordingly, to the extent Plaintiff is suing Defendants in
24 their official capacities for prospective injunctive relief, the Eleventh Amendment does not
25 bar Plaintiff’s suit and dismissal of Defendants in their official capacities on Eleventh
26 Amendment immunity grounds should be **DENIED**.

27 ///

Plaintiff failed show any personal participation on the part of Defendant Skolnik.²

Plaintiff failed to show any personal participation on the part of Defendant McDaniel.

Defendant Whorton specifically addressed Plaintiff's grievances on November 21, 2005, agreeing that his grievances were appropriately answered on all levels (Doc. #4 at 27). Presumably, he personally reviewed the grievances and agreed with or acquiesced in the responses given.

Defendant Cox denied Plaintiff's Level 2 grievance regarding recognizing NOI as a religion, stating NOI is a political organization and not a recognized faith group (*Id.* at 28).

Defendant Baca received a copy of a memorandum issued by Defendant Neven on September 2, 2005 addressed to Plaintiff specifically stating NDOC will not be recognizing the December Ramadan fast (*Id.* at 19). Viewing the evidence in the light most favorable to Plaintiff, this memorandum indicates Defendant Baca played a role in the decision and agreed with the response given.

Defendant Wallace also received a copy of the memorandum issued by Defendant Neven on September 2, 2005 addressed to Plaintiff specifically stating NDOC will not be recognizing the December Ramadan fast (*Id.*). Again, viewing the evidence in the light most favorable to Plaintiff, this memorandum indicates Defendant Wallace played a role in the decision and agreed with the response given.

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1 **7. Defendant Neven**

2 Defendant Neven personally issued the September 2, 2005 memorandum specifically
3 stating NDOC will not be recognizing the December Ramadan fast (Doc. #4 at 19).

4 **8. Defendant Cassaleggio**

5 Defendant Cassaleggio informed Plaintiff's caseworker that NOI is not a recognized
6 religious sect, as well as purportedly called Chicago headquarters to determine whether NOI
7 members were required to follow the December Ramadan (*Id.* at 31; Doc. #7, Exh. C).
8 Apparently, based on information he received from NOI headquarters, Defendant Cassaleggio
9 determined Plaintiff was not required to follow the December Ramadan.

10 Construing the complaint liberally and viewing the facts and the evidence in the light
11 most favorable to him, Plaintiff has shown personal participation on the part of Defendants
12 Whorton, Cox, Baca, Wallace, Neven and Cassaleggio. Plaintiff has not shown personal
13 participation on the part of Defendants Skolnik and McDaniel. Accordingly Defendants'
14 request to dismiss Defendants Whorton, Cox, Baca, Wallace, Neven and Cassaleggio for lack
15 of personal participation should be **DENIED**. Defendants' request to dismiss Defendants
16 Skolnik and McDaniel should be **GRANTED**.

17 **E. QUALIFIED IMMUNITY**

18 "Qualified immunity protects government officials ... from liability for civil damages
19 insofar as their conduct does not violate clearly established statutory or constitutional rights
20 of which a reasonable person would have known." *Phillips v. Hust*, 477 F.3d 1070, 1079 (9th
21 Cir. 2007). Under certain circumstances state officials are entitled to qualified immunity when
22 sued in their personal capacities. *Carey v. Nevada Gaming Control Board*, 279 F.3d 873, 879
23 (9th Cir. 2002). When a state official reasonably believes his or her acts were lawful in light
24 of clearly established law and the information they possessed, the official may claim qualified
25 immunity. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam); *Orin v. Barclay*, 272 F.3d
26 1207, 1214 (9th Cir. 2001). Where "the law did not put the officer on notice that his conduct
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1 would be clearly unlawful, summary judgment based on qualified immunity is appropriate.”
2 *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

3 In analyzing whether the defendant is entitled to qualified immunity, the court must
4 consider two issues. First, the court must make a threshold inquiry into whether the Plaintiff
5 alleges deprivation of a constitutional right. *Hope v. Pelzer*, 536 U.S. 730, 736 (2000); *Saucier*,
6 533 U.S. at 201. If no constitutional violation occurred, the court need not inquire further.
7 *Saucier*, 533 U.S. at 201. If a constitutional violation did occur then the court must next
8 establish whether the right was clearly established at the time of the alleged violation such
9 that the official could have reasonably, but mistakenly, believed that his or her conduct did
10 not violate a clearly established right. *Id.* at 202.

11 The crux of Plaintiff's complaint centers around Defendants' denial of Plaintiff's
12 religious request for special diet arrangements to observe the December Ramadan fast in
13 December, 2005; Defendants' denial of Plaintiff's Religious Faith Group Application
14 recognizing NOI as a religion; Defendants' alleged retaliatory actions against Plaintiff for
15 practicing his NOI religious belief, e.g., MJ-10 charges and transfer to maximum security
16 prison; Defendants' refusal to make allotments for Plaintiff's religious garments, e.g. bowties;
17 and Defendants' failure to provide timely "pre-dawn" meals during the traditional month of
18 Ramadan recognized by all Muslims beginning October 5, 2005 through November 4, 2005
19 (Doc. #4).

20 **1. First Amendment Right to Free Exercise of Religion**

21 "The right to exercise religious practices and beliefs does not terminate at the prison
22 door. The free exercise right, however, is necessarily limited by the fact of incarceration, and
23 may be curtailed in order to achieve legitimate correctional goals or to maintain prison
24 security. *McElyea v. Babbitt*, 833 F.2d 196, 197 (9th Cir. 1987) (per curiam) (citations
25 omitted). "In order to establish a free exercise violation, [the prisoner] must show the
26 defendants burdened the practice of his religion ... by preventing [the prisoner] from engaging
27 in conduct mandated by his faith." *Freeman v. Arpaio*, 125 F.3d 732, 736 (9th Cir. 1997).

1 A First Amendment religious claim must satisfy two (2) requirements to merit
 2 protection: 1) the claimant's belief must be "sincerely held;" and 2) "the claim must be rooted
 3 in religious belief, not in purely secular philosophical concerns." *Malik v. Brown*, 16 F.3d 330,
 4 333 (9th Cir. 1994) (citations and quotations omitted). To prove a free exercise of religion
 5 violation, the claimant must demonstrate officials burdened the practice of his sincerely held
 6 religious beliefs "by preventing him from engaging in conduct mandated by his faith, without
 7 justification reasonably related to legitimate penological interests." *Freeman v. Arpaio*, 125
 8 F.3d 732, 736 (9th Cir. 1997) (citing *Turner*, 482 U.S. at 89).

9 a. Ramadan meals (December and Traditional)

10 Defendants essentially argue that they did not violate Plaintiff's First Amendment rights
 11 by denying Plaintiff's special diet request pertaining to the December Ramadan because NOI
 12 is not a recognized religion and Plaintiff had alternate means of exercising his NOI beliefs
 13 (Doc. #7 at 16). Defendants did not address Plaintiff's allegation that they also denied him
 14 the opportunity to effectively participate in the traditional Ramadan from October 5, 2005
 15 through November 4, 2005, practiced by all Muslims, by serving the pre-dawn meals late.

16 It is clearly established law in the Ninth Circuit that inmates have a constitutional right
 17 to "food sufficient to sustain them in good health that satisfies the dietary laws of their
 18 religion." See *Ashelman v. Wawrzaszek*, 111 F.3d 674, 677 (9th Cir. 1997); *Ward v. Walsh*,
 19 1 F.3d 873, 876 (9th Cir. 1992); *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987). Under
 20 established law, prison authorities must generally accommodate the rights of prisoners to
 21 receive a diet consistent with their religious beliefs. *Id.* "The free exercise right, however, is
 22 necessarily limited by the fact of incarceration, and may be curtailed in order to achieve
 23 legitimate correctional goals or to maintain prison security." *Id.* (citing *O'Lone v. Shabazz*,
 24 482 U.S. 342, 348 (1987)).

25 Defendants are correct that *Turner v. Safley*, 482 U.S. 78, 89 (1987) provides the test
 26 for balancing these interests by setting forth four (4) factors to be considered in determining
 27 when a regulation is reasonably related to a penological interest; however, the court need not
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1 address the *Turner* factors because Defendants failed to put forth any legitimate penological
2 interest with respect to Plaintiff's request for the Ramadan meals. In analyzing the *Turner*
3 factors, Defendants set forth general penological interests of safety, security, budget
4 restrictions and staffing limitations for denying NOI separate services and other
5 accommodations and not recognizing NOI as a religion (Doc. #7 at 16-17). Defendants did
6 not specifically address Plaintiff's request for a special diet during the December Ramadan
7 or his request to correct the late delivery of the pre-dawn meals served during the traditional
8 Ramadan. Defendants' broad generalizations and allegations with respect to NOI as a whole
9 are insufficient to set forth legitimate penological interests for denying Plaintiff's request for
10 the Ramadan meals.

11 The Supreme Court has held that a Free Exercise claimant need not be a member of
12 a particular organized religious denomination to show sincerity of his religious belief. *Frazee*
13 *v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989) (Court found refusal to work on
14 Sundays a sincerely held religious belief where appellant asserted he was Christian, but did
15 not claim to be a member of a particular Christian sect, and did not claim his refusal to work
16 on Sundays resulted from a "tenet, belief or teaching of an established religious body."); *see*
17 *also Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008) (holding the sincerity test
18 determines whether the Free Exercise Clause applies). The Court stated that "[w]hile
19 membership in a sect would simplify the problem of identifying sincerely held beliefs, the
20 notion that one must be responding to the commands of a particular religious organization
21 to claim the protection of the Free Exercise Clause is rejected." *Frazee*, 489 U.S. at 829.
22 Additionally, courts may not inquire into the truth of a prisoner's belief, nor may the court
23 limit protected beliefs to those shared by all members of a religious sect. *United States v.*
24 *Ballard*, 322 U.S. 78, 87 (1944). The inquiry is "not definitional, but devotional," and
25 evaluates whether the beliefs are "held with the strength of traditional religious convictions."
26 *United States v. Ward*, 989 F.2d 1015, 1018 (9th Cir. 1992). "[W]hile practice or nonpractice
27 of a particular tenet of a religion may be relevant to sincerity, it is not conclusive." *Moster v.*

1 *Maynard*, 937 F.2d 1521, 1523 (9th Cir. 1991) (citing *Reed v. Faulkner*, 842 F.2d 960, 963
2 (7th Cir.1988)).

3 To merit protection under the free exercise clause of the First Amendment, a
4 religious claim must satisfy two criteria. “First, the claimant’s proffered belief
5 must be sincerely held; the First Amendment does not extend to ‘so-called
6 religions which ... are obviously shams and absurdities and whose members are
7 patently devoid of religious sincerity.” *Callahan v. Woods*, 658 F.2d 679, 683
8 (9th Cir.1981) (quoting *Theriat v. Carlson*, 495 F.2d 390, 395 (5th Cir.), cert.
9 denied, 419 U.S. 1003, 95 S.Ct. 323, 42 L.Ed.2d 279 (1974)). Second, “the claim
must be rooted in religious belief, not in ‘purely secular’ philosophical
concerns.” *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-16, 92 S.Ct. 1526,
1533, 32 L.Ed.2d 15 (1972)); *Johnson v. Moore*, 948 F.2d 517, 520 (9th Cir.1991)
(claims must be religious in nature). Determining whether a claim is “rooted
in religious belief” requires analyzing whether the plaintiff’s claim is related to
his sincerely held religious belief. *Callahan*, 658 F.2d at 683-84.

10 *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994).

11 Under these facts, Defendants’ recognition (or non-recognition, rather) of NOI as a
12 “religion” is not dispositive on the issue of whether they violated Plaintiff’s Free Exercise rights
13 by denying his request for a special religious diet and denying or ignoring his requests to
14 timely deliver the meals associated with his special religious diet. Defendants were required
15 to determine whether Plaintiff’s belief that he must fast during the month of December and
16 required a special diet was a sincerely held religious belief.

17 Even construing Defendants’ assertion – that all Muslims, including NOI members,
18 now observe only the traditional Ramadan – as true, Defendants were nevertheless required
19 to determine whether Plaintiff’s beliefs that *he* must follow the December Ramadan is held
20 with the strength of traditional religious convictions. *The court may not limit protected*
21 *beliefs to those shared by all members of a religious sect. Ballard*, 322 U.S. at 87 (emphasis
22 added). And, as the Supreme Court long ago found: “With man’s relations to his Maker and
23 the obligations he may think they impose, and the manner in which an expression shall be
24 made by him of his belief on those subjects, no interference can be permitted, provided always
25 the laws of society, designed to secure its peace and prosperity, and the morals of its people,
26 are not interfered with.” *Ballard*, 322 U.S. at 87 (citing *Prince v. Massachusetts*, 321 U.S. 158
27 (1944)).

1 The court is not saying Defendants are required to accommodate every individual
2 inmate's special religious diet request where the inmate holds a sincerely held religious belief,
3 as there may be legitimate penological interests for not doing so. But, the court is saying, here,
4 Defendants have advanced none. Defendants have also advanced no penological interest for
5 the late delivery of the pre-dawn meals during the traditional Ramadan. Thus, under these
6 facts, Defendants' refusal to provide Plaintiff with a special diet during the December
7 Ramadan and Defendants' failure to timely provide Plaintiff with the pre-dawn meals during
8 the traditional Ramadan implicates the Free Exercise Clause if Plaintiff held a sincere belief
9 that he was personally required to fast during those months in order to maintain his
10 spirituality. *Shakur*, 514 F.3d 878. Accordingly, Defendants' request for summary judgment
11 on qualified immunity grounds with respect to the Ramadan meals should be **DENIED**.

12 b. Religious garments

13 Plaintiff asserts he was denied religious garments associated with his NOI religion.
14 Apparently, Defendants denied Plaintiff's requests for religious garments for the same reasons
15 they denied the December Ramadan meals – they do not recognize NOI as a religion. As
16 previously discussed, it is clearly established law that prisoners are entitled to accommodation
17 for their sincerely held religious beliefs where certain conduct is mandated by their religion
18 and the accommodation does not threaten a legitimate penological interest. *Freeman*, 125 F.3d
19 at 736.

20 Once again, there is no evidence in the record that Defendants made any inquiries into
21 whether Plaintiff's requested garments were part of *his* sincerely held religious beliefs and
22 Defendants advanced no legitimate penological interest for the alleged denial. Instead, it
23 appears Defendants relied solely on their own determination that NOI was not a recognized
24 religion; therefore, Plaintiff was not entitled to any garments associated with NOI. Without
25 addressing the constitutionality of Defendants' denial of NOI as a religion, Defendants do
26 advance legitimate penological justifications for the refusal to recognize NOI as its own
27 religious sect or to allow NOI members their own sect-specific services (Doc. #7 at 16-17).

1 Furthermore, the determination that NOI is not a religion is relevant to the determination
2 of whether Plaintiff's beliefs are "religious beliefs" and not merely "philosophical or personal
3 beliefs." However, Defendants did not address Plaintiff's actual claim of being denied religious
4 garments, nor did they inquire into the sincerity of *Plaintiff's* religious beliefs; they simply
5 argue NOI is not a recognized religion.

6 The fact that Plaintiff requests religious garments (or a special diet for that matter)
7 based on beliefs that are central to NOI does not, by itself, provide Defendants with a proper
8 basis for denying Plaintiff's requests if Plaintiff's requests are based on his sincerely held
9 religious beliefs. The Ninth Circuit recently recognized that the Supreme Court disapproves
10 of the "centrality test" and requires the "sincerity test" to determine whether the Free Exercise
11 Clause applies. *Shakur*, 514 F.3d at 885.³ Thus, Defendants decision not to recognize NOI
12 as a religion is an insufficient basis, alone, to deny Plaintiff's requests for religious garments.
13 Defendants must determine if Plaintiff's requests are based on sincerely held religious beliefs,
14 and if they are, Defendants must have a legitimate penological interest for burdening those
15 "religious beliefs."

16 Under these facts, it appears Defendants denied Plaintiff's requests for religious
17 garments simply because they do not recognize NOI as a religion and Plaintiff's requests are
18 central to NOI. Because the law was clearly established at the time of the alleged conduct and
19 required Defendants to inquire into the sincerity of Plaintiff's religious beliefs, Defendants'
20 request for summary judgment on qualified immunity grounds with respect to the denial of
21 religious garments should be **DENIED**.

22 ///

23 ///

24
25 ³ "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or
26 the validity of the particular litigants' interpretations of those creeds." *Shakur*, 514 F.3d at 884 (citing *Hernandez*
27 *v. C.I.R.*, 490 U.S. 680, 699 (1989)). "It is no more appropriate for judges to determine the 'centrality' of religious
28 beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine
the 'importance' of ideas before applying the 'compelling interest' test in the free speech field." *Id.* (citing
Employment Div., Dept. Of Human Resources of Oregon v. Smith, 494 U.S. 872, 886-887 (1990)).

1 c. Disciplinary Charges and Transfers

2 Plaintiff asserts Defendants retaliated against him for practicing his religious beliefs
3 by writing him up for gang affiliation charges and transferring him to a maximum security
4 prison.

5 Transfers for the sole purpose of penalizing prisoners for certain religious beliefs is
6 unconstitutional and was clearly established law at the time of the alleged conduct. *Fajeriak*
7 *v. McGinnis*, 493 F.2d 468, 470 (9th Cir. 1974). Bringing Plaintiff up on disciplinary charges
8 as a penalty to discourage certain religious beliefs is also clearly unconstitutional and was
9 clearly established law at the time of the alleged conduct. *Id.*

10 As previously explained, Defendants' decision not to recognize NOI as a religion does
11 not preclude Plaintiff from holding sincerely held religious beliefs central to NOI; thus, NOI
12 does not need to be a recognized religion within NDOC in order for Plaintiff to be retaliated
13 against for practicing his sincerely held beliefs associated with NOI. Thus, viewing the facts
14 in the light most favorable to Plaintiff, if he was, in fact, brought up on charges and/or
15 transferred only because of actual or suspected religious activities (activities associated with
16 NOI that are religious in nature), he has stated a claim for relief and Defendants are not
17 entitled to qualified immunity for their alleged conduct. *Id.*; *see also Cooper v. Pate*, 378 U.S.
18 546, (1964); *Haines v. Kerner*, 404 U.S. 519 (1971). Accordingly, Defendants' request for
19 summary judgment on qualified immunity grounds with respect to the alleged disciplinary
20 charges and transfer should be **DENIED**.

21 d. Recognition of NOI as a religion

22 Plaintiff asserts Defendants denied his request to have NOI recognized as a religion.
23 Defendants argue NOI is not a recognized religion because it has been linked to gang violence
24 and some sects have been deemed gangs and security threat groups (STGs) (Doc. #7 at 16).

25 While Defendants make only general allegations regarding NOI and do not assert that
26 all NOI members are linked to gang violence, gangs and STGs, or that Plaintiff has been linked
27 to gang violence, gangs or STGs, or even that NOI members at HDSP have been linked to gang
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1 violence, gangs or STGs, they are nevertheless entitled to qualified immunity on this issue.
 2 Neither the Ninth Circuit nor the Supreme Court have expressly found that NOI is, in fact,
 3 a recognized religion. And the Ninth Circuit holds that while “[i]t is impermissible to inquire
 4 into the ‘truth’ of religious doctrines or beliefs.... [t]here is no prohibition, however, against
 5 ruling whether or not a set of beliefs constitutes a religion when deciding if First Amendment
 6 protections apply.” *Jones v. Bradley*, 590 F.2d 294, 295 (9th Cir. 1979) (internal citations
 7 omitted).

8 Although a determination of what is a “religious” belief or practice entitled to
 9 constitutional protection may present a most delicate question, the very concept
 10 of ordered liberty precludes allowing every person to make his own standards
 11 on matters of conduct in which society as a whole has important interests. Thus,
 12 if the Amish asserted their claims because of their subjective evaluation and
 13 rejection of the contemporary secular values accepted by the majority, much as
 14 Thoreau rejected the social values of his time and isolated himself at Walden
 15 Pond, their claims would not rest on a religious basis. Thoreau’s choice was
 16 philosophical and personal rather than religious, and such belief does not rise
 17 to the demands of the Religion Clauses. One district court has stated that,
 18 although “(t)he task is . . . greatly simplified where an historically established
 19 and recognized religion such as Islam, Judaism or Catholicism is involved”, a
 20 court “must initially determine whether or not a *religion or religious beliefs* are
 21 actually involved” in a case dealing with a free exercise question. *Theriault v.*
 22 *Silber*, 391 F.Supp. 578, 580 (W.D.Tex.1975).

23 *Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1974) (emphasis added).

24 Even if it is determined that NOI is, and should be, a recognized religion, that has not
 25 been fleshed out in prior case law in this Circuit. Thus, no reasonable official would have
 26 known at the time of the conduct in question that denying Plaintiff’s application to recognize
 27 NOI as a religion would violate Plaintiff’s constitutional rights. Accordingly, Defendants’
 28 request for summary judgment on qualified immunity grounds with respect to the denial of
 Plaintiff’s application to recognize NOI as a religion should be **GRANTED**.

29 **2. Fourteenth Amendment Equal Protection**⁴

30 It is clearly established law that prisoners enjoy religious freedom and equal protection
 31 of the law subject to restrictions and limitations necessitated by legitimate penological

32 ⁴ Plaintiff only pled an Equal Protection Claim in Count I.

1 interests. *Bell v. Wolfish*, 441 U.S. 520, 545-546 (1979). The Equal Protection Clause requires
2 the State to treat all similarly situated people equally. *See City of Cleburne v. Cleburne Living*
3 *Center*, 473 U.S. 432, 439 (1985). It ensures that prison officials cannot discriminate against
4 particular religions; but, must afford each prisoner “a reasonable opportunity of pursuing his
5 faith comparable to the opportunity afforded fellow prisoners who adhere to conventional
6 religious precepts.” *Cruz v. Beto*, 405 U.S. 319, 321-322 (1972) (per curiam).

7 In order to state a viable Equal Protection claim, Plaintiff “must show that the
8 defendant acted with an intent or purpose to discriminate against him based upon his
9 membership in a protected class.” *Serrano v. Francis*, 345 F.3d 1971, 1982 (9th Cir. 2003)
10 (citing *Barren v. Harrington*, 132 F.3d 1193, 1194 (9th Cir. 1998)). “Intentional
11 discrimination means that a defendant acted at least in part *because of* a plaintiff’s protected
12 status.” *Id.* (citing *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994) (emphasis
13 in original)).

14 Defendants contend the “*Turner* factors of interests in security, budget restrictions,
15 and staffing limitations, as discussed in the context of Plaintiff’s Free Exercise claim, are
16 equally valid and applicable to his Equal Protection claim.” (Doc. #7 at 19). Defendants’
17 *Turner* analysis, however, does not specifically address Defendants’ decision to deny Plaintiff’s
18 request for December Ramadan meals (except to the extent it is implicit that it was denied
19 because NOI is not a recognized religion) or the late delivery of the pre-dawn traditional
20 Ramadan meals; but, rather addresses the decision not to allow NOI separate services “and
21 other accommodations.”

22 As previously stated, under established law, prison authorities must generally
23 accommodate the rights of prisoners to receive a diet consistent with their religious beliefs
24 and may only curtail that right in order to achieve legitimate correctional goals or to maintain
25 prison security. Construing the facts in the light most favorable to Plaintiff, if Defendants
26 denied Plaintiff a reasonable opportunity of pursuing his faith (sincerely held religious beliefs)
27 comparable to the opportunity afforded fellow prisoners who adhere to conventional religious
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1 precepts, then there was palpable discrimination by Defendants against Plaintiff. *Cruz*, 405
2 U.S. at 322. With respect to the denial of Ramadan meals, Defendants basically admit the
3 denial was solely based on their decision that NOI is not a religion; thus, the decision was
4 based on Plaintiff's religious beliefs (despite the circular argument that NOI is not a religion;
5 therefore, Plaintiff's beliefs are not religious). If Plaintiff's beliefs are sincerely held religious
6 beliefs, they are protected under both the First and Fourteenth Amendments.

7 As previously stated, not every religious sect or group within a prison must have
8 identical facilities or personnel; but, a reasonable opportunity must be afforded to *all*
9 *prisoners* to exercise the religious freedoms guaranteed by the First and Fourteenth
10 Amendments without fear of penalty. *Cruz*, 405 U.S. at 322. Thus, although Defendants may
11 not recognize NOI as a religion, if in fact Plaintiff's NOI beliefs are sincerely held religious
12 beliefs, they are nevertheless protected under the First and Fourteenth Amendments and
13 Defendants must afford Plaintiff the opportunity to exercise those sincerely held *religious*
14 *beliefs* comparable to that afforded prisoners adhering to conventional religions unless they
15 have a *legitimate penological interest* for burdening those beliefs.

16 There is no evidence in the record showing Defendants considered whether Plaintiff's
17 beliefs regarding the December Ramadan meals and the late pre-dawn traditional Ramadan
18 meals were sincerely held religious beliefs, and although they contend they afforded Plaintiff
19 a reasonable opportunity to exercise his religious beliefs because he could worship with
20 traditional Islamic groups, the record indicates Defendants simply denied Plaintiff's requests
21 for special religious accommodation solely because they were associated with NOI and
22 Defendants do not recognize NOI as a "religion." Thus, viewing the facts in the light most
23 favorable to Plaintiff, he has sufficiently stated a viable Equal Protection claim with respect
24 to the Ramadan meals and the law was clearly established at the time of the alleged conduct.
25 Accordingly, Defendants' request for summary judgment on qualified immunity grounds with
26 respect to the Ramadan meals should be **DENIED**.

For the same reasons set forth *supra* under the First Amendment analysis, the law was not clearly established with respect to denying Plaintiff's application to recognize NOI as a religion and, therefore, Defendants' request for summary judgment on qualified immunity grounds with respect to Plaintiff's application to recognize NOI as a religion should be **GRANTED**.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge enter an order **GRANTING in part** and **DENYING in part** Defendants' Motion to Dismiss (Doc. #7) as follows:

- 1) Defendants' request to dismiss Plaintiff's complaint on grounds of mootness should be **DENIED**.
- 2) Defendants' request to dismiss Plaintiff's First Amendment claim dealing with the denial of his Religious Faith Group Recognized Application on grounds that Plaintiff failed to exhaust his administrative remedies should be **DENIED**.
- 3) Defendants' request to dismiss Defendants in their official capacities on Eleventh Amendment immunity grounds should be **DENIED**.
- 4) Defendants' request to dismiss Defendants Whorton, Cox, Baca, Wallace, Neven and Cassaleggio for lack of personal participation should be **DENIED**.
- 5) Defendants' request to dismiss Defendants Skolnik and McDaniel for lack of personal participation should be **GRANTED**.
- 6) Defendants' request for summary judgment on Plaintiff's First Amendment claim on qualified immunity grounds with respect to the Ramadan meals should be **DENIED**.
- 7) Defendants' request for summary judgment on Plaintiff's First Amendment claim on qualified immunity grounds with respect to the denial of religious garments should be **DENIED**.
- 8) Defendants' request for summary judgment on Plaintiff's First Amendment claim on qualified immunity grounds with respect to the alleged disciplinary charges and transfer should be **DENIED**.
- 9) Defendants' request for summary judgment on Plaintiff's First Amendment claim on qualified immunity grounds with respect to the denial of Plaintiff's application to recognize NOI as a religion should be **GRANTED**.
- 10) Defendants' request for summary judgment on Plaintiff's Fourteenth Amendment claim on qualified immunity grounds with respect to the Ramadan meals should be **DENIED**.

11) Defendants' request for summary judgment on Plaintiff's Fourteenth Amendment claim on qualified immunity grounds with respect to the application to recognize NOI as a religion should be **GRANTED**.

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, specific written objections to this Report and Recommendation within ten (10) days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1), Fed. R. Civ. P., should not be filed until entry of the District Court's judgment.

DATED: July 24, 2008.



UNITED STATES MAGISTRATE JUDGE